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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 124

WILLIE S. GRIGGS, ET AL., PETITIONERS

*v.*

DUKE POWER COMPANY

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### OPINIONS BELOW

The opinion of the court of appeals (A. 206a–250a) is reported at 420 F. 2d 1225. The opinion of the district court (A. 26a–42a) is reported at 292 F. Supp. 243.

### JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970. The petition for a writ of certiorari was filed on April 9, 1970, and was granted on June 29, 1970 (399 U.S. 926). The jurisdiction of this Court rests on 28 U.S. 1254(1).

## QUESTION PRESENTED

Whether it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to require completion of high school or passage of certain general intelligence tests as a condition of eligibility for employment in, or transfer to, jobs formerly reserved only for white employees, when:

(1) both requirements operate to disqualify Negroes at a substantially higher rate than whites; and

(2) neither has been shown to be necessary for successful performance of the jobs.

## STATUTE AND REGULATION INVOLVED

Title VII of the Civil Rights Act of 1964 (78 Stat. 253, *et seq.*, 42 U.S.C. 2000e, *et seq.*) provides in pertinent part as follows:

> SEC. 703(a) It shall be an unlawful employment practice for an employer—
>
> * * * * *
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * *
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that

such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. * * *

* * * * *

The Equal Employment Opportunity Commission *Guidelines on Employment Testing Procedures,* adopted August 24, 1966, CCH *Employment Practice Guide,* ¶ 16,904, state in pertinent part as follows:

* * * * *

The Commission interprets "professionally developed ability test" [in Section 703(h)] to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

**INTEREST OF THE UNITED STATES**

Federal responsibility for enforcing Title VII of the Civil Rights Act of 1964 rests with the Attorney General and the Equal Employment Opportunity Commission. Pursuant to Title VII and the provisions of Executive Order 11246 prohibiting employment discrimination by government contractors and subcontractors, the United States is engaged in comprehensive efforts to eliminate racially discriminatory employment practices and to remedy the continuing effects of past discrimination. But the goal of equal

employment opportunity remains unrealized; unemployment and underemployment among Negroes and other minority groups continues to be substantially higher than it is among the population at large,[1] and remains a serious national problem.

The Equal Employment Opportunity Commission issued *Guidelines on Employment Testing Procedures*[2] shortly after Title VII became effective. The Guidelines interpreted Section 703(h) as permitting only tests which measure ability to perform the jobs for which they are used, that is, "job-related" tests. The Commission's interpretation was based on the legislative history of Title VII in general and the testing proviso of Section 703(h) in particular, and has been followed elsewhere in the Executive Branch.[3]

The decision of the court of appeals is inconsistent with the Commission's interpretation of Section 703 (h) and would, if permitted to stand, sanction the use of employment screening devices which do not measure abilities to perform specific jobs but do seriously limit employment and promotion opportunities for Negroes and other minority groups. This would seri-

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[1] For example, in July 1970, the unemployment level for nonwhites was 8.3 percent, while that for whites was 4.7 percent. See Bureau of Labor Statistics, *Employment and Earnings*, August 1970, Table A–3, *Major Unemployment Indicators*.

[2] The guidelines were issued on August 24, 1966, and published in CCH *Employment Practice Guide* ¶ 16,904, and are reprinted in the Appendix pp. A–129b–136b. Revised guidelines, effective August 1, 1970, 29 C.F.R. 1607, are reprinted in the Appendix to petitioners' brief, pp. 8–11.

[3] The Secretary of Labor has applied the same testing standard with respect to the employment practices of federal contractors and subcontractors under Executive Order 11246 (see 33 Fed. Reg. 14392).

ously impede the government's continuing efforts to achieve the equality of employment opportunities which Title VII was intended to insure.

## STATEMENT

1. Traditionally, respondent Duke Power Company discriminated on the basis of race in the hiring and assigning of employees at its Dan River Steam Station in Eden, North Carolina (A. 32a).[4] Negroes were employed only in the Labor Department, where the highest paying jobs they occupied paid less than the lowest paying jobs in four other "operating" departments, in which only whites were employed (A. 32a, 72b). The "operating" departments were the Coal Handling Department, responsible for receiving, weighing, sampling, and storing coal; the Operating Department, responsible for operating the boilers, turbines, and auxiliary equipment used to generate electric power; the Maintenance Department, responsible for mechanical, electrical, and related maintenance activities; and the Laboratory and Test Departments, which are responsible for various chemical and electrical monitoring activities necessary to the operation of the power station (A. 55a–58a). Certain miscellaneous jobs, such as watchman, were also white only (A. 58a). Promotions were normally made within each department on the basis of job seniority.

[4] The printed Appendix in this case is supplemented by a separate Exhibit volume. Page references to the Appendix are identified by a lower case "a", *e.g.*, A. 32a, and those to the Exhibit volume by a lower case "b", *e.g.*, A. 72b.

Transferrees into a department usually began in the lowest position (A. 58a–60a, 208a).

A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department (A. 69a, 83b).

In the 1950's the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling Department or Watchman to any "inside" department (Operations, Maintenance, or Laboratory and Test Departments) (A. 85a, 92a). When the Company abandoned its policy of restricting Negroes to the Labor Department, completion of high school was also made a prerequisite to transfers from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees without a high school education continued to perform satisfactorily and achieve promotions in the the "operating" departments (A. 77b, 83b, 126b–127b).

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two commercially prepared aptitude tests, as well as have a high school education (A. 86a–87a). Completion of high

school alone continued to render incumbent employees eligible for transfer to the four desirable departments from which Negroes had been excluded. In September 1965, the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor, Coal Handling or Watchman to an "inside" job by passing the two tests (A. 85a–86a).

The tests used were the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test (A. 165a). Neither was intended to measure the ability to learn or perform a particular job or group of jobs (A. 109a; 181a–184a). The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates (A. 87a–88a; 181a–183a). The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.[5]

2. This class suit was brought by the thirteen Negro employees of the Labor Department on October 20, 1966, alleging that the Company's testing, transfer, and seniority practices violated the rights of incumbent Negro employees under Title VII of the Civil Rights Act of 1964 by conditioning eligibility for transfer out of the Labor Department on educational or testing requirements which were not imposed on

[5] The cut-off on the Wonderlic test was slightly lower than the national median for high school graduates, while that used on the Bennett test coincided with the national median score. Company witnesses testified that their objective in selecting the cut-offs was to set them at levels achieved by the "average" high school graduate (A. 181a–183a).

white employees previously assigned to jobs in more desirable departments. They further contended that, even if applied by the Company only to persons hired after they were instituted, the high school and testing requirements were unlawful since, by disqualifying Negroes in substantially higher proportions than whites, they operated to restrict Negroes to the low paying labor jobs when there was no business necessity for doing so, thus perpetuating the effects of the Company's past discrimination.

Through expert testimony, the plaintiffs attacked the testing requirements on grounds that the Company had not shown that the tests measured capacity to perform, or predicted success in, any particular job or class of jobs in the plant. The testimony of plaintiffs' expert also tended to show that the tests disqualified a larger proportion of Negroes than whites (A. 140a, 147a–148a, 154a–155a).

The Company's expert conceded that the tests were not designed to measure a person's capacity to perform certain jobs. He testified that they were intended merely as a substitute for a high school education on "the assumption * * * that * * * the high school education [provides] the training and ability and judgment that a person need[s] * * * to do the jobs" in the plant (A. 181a). The Company did not, however, demonstrate any relationship between completion of high school and successful job performance (A. 93a, 188a). The high school requirement was instituted solely because Company officials thought such a policy desirable (A. 93a, 103a–104a).

3. The district court found that the Company had followed a policy of overt racial discrimination prior to the adoption of the Act, but that, as of the time of trial, the practice of making initial assignments based on race had ceased (A. 32a). While the court agreed that the Company's limitations on transfer eligibility and its department seniority system resulted in continuation of past inequities, it denied relief on the ground that application of Title VII was intended to be prospective only (A. 34a–35a).

The court of appeals reversed in part, unanimously rejecting the district court's holding that Title VII does not prohibit facially neutral practices which perpetuate the effects of past discrimination. The court of appeals ruled that Negroes employed in the Labor Department at a time when there was no high school requirement for entrance into the higher paying departments could not now be made subject to that requirement, since whites hired contemporaneously into those departments were never subject to it. The court also required that the seniority rights of those Negroes be measured on a plant-wide, rather than a departmental, basis.[6]

With respect to Negroes hired *after* imposition of the high school requirement, however, a majority of the court of appeals affirmed the judgment of the

[6] The court held that the case was moot as to four Negro employees. Three have a high school education and have been transferred out of the Labor Department, while the fourth recently completed a high school equivalency course. The logic of the court's seniority ruling, *i.e.*, that the plaintiffs to whom the high school requirement may no longer be applied must be accorded plant-wide seniority, applies as well to these

district court. The court noted that there was no finding of a racial purpose or motive in the adoption of the high school or test requirements and that they had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. The court expressly rejected petitioners' contention that, since both requirements operated to disqualify proportionately more Negroes than whites, they were unlawful under Title VII unless shown to be valid predictors of job success ("job-related"). Judge Sobeloff dissented from this aspect of the decision, maintaining, as do petitioners in this Court, that Title VII prohibits the use of employment criteria which operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

## SUMMARY OF ARGUMENT

Duke Power Company formerly made it a practice to assign Negro employees only to its lowest paying, laboring jobs. That practice has apparently been abandoned, and the Company does not engage in overt discrimination. Now, however, Duke requires that applicants for assignment or transfer to previously "white" jobs have either completed high school or scored satisfactorily on two commercially available paper-and-pencil aptitude tests. Use of these two

four who have a high school diploma or its equivalent, since they too were originally assigned to the Labor Department on account of race, and continued to work in that Department until well after the effective date of Title VII.

standards violates Section 703(a)(2) of the Civil Rights Act of 1964 because neither has been shown fairly to predict successful performance of the jobs for which they are used, and both operate to disqualify substantially higher percentages of Negro applicants than white.

1. Lower federal courts have consistently endorsed the proposition that the ongoing effects of past racial discrimination may be remedied under Title VII. Courts of appeals for the Fifth, Sixth, Eighth, and, in this case Fourth, Circuits, as well as a number of district courts, have required abandonment or modification of facially neutral practices because they perpetuated the effects of earlier overt discrimination. The seniority systems[7] and the union membership and job referral restrictions[8] which have been held illegal by other federal courts, like the high school completion and test requirements at issue here, retarded advancement of blacks into jobs from which they formerly were excluded and were not required by business necessity.

2. Respondent contends, and the majority of the court of appeals agreed, that the tests are protected by the "professionally developed ability test" provision in Section 703(h). This expansive reading of the provision to permit use of racially exclusionary

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[7] *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.).

[8] *United States* v. *IBEW Local 38*, 63 Lab. Cas. ¶ 9463 (C.A. 6); *United States* v. *Sheet Metal Workers Int. Ass'n, Local U. 36*, 416 F. 2d 123 (C.A. 8); *Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs.* v. *Vogler*, 407 F. 2d 1047 (C.A. 5).

tests unrelated to ability to perform the job applied for conflicts with its language and is unsupported by its legislative history. The position of the Equal Employment Opportunity Commission that the provision permits only job-related ability testing should have been upheld by the court of appeals.

## ARGUMENT

### I

### THE COMPANY'S HIGH SCHOOL/TEST REQUIREMENT FOR EMPLOYMENT IN TRADITIONALLY ALL-WHITE DEPARTMENTS VIOLATES SECTION 703(a)(2) OF THE CIVIL RIGHTS ACT OF 1964

#### A. AN EMPLOYMENT PRACTICE THAT APPEARS NEUTRAL BUT HAS THE EFFECT OF DISCRIMINATING ON THE BASIS OF RACE WITHOUT BUSINESS NECESSITY IS PROHIBITED

Petitioners' basic contention, with which we agree, is that the rights created by Congress when it enacted Title VII of the Civil Rights Act of 1964 may no more be frustrated by apparently neutral employment practices, not justified by business necessity, which have racially exclusionary effects than by overtly discriminatory practices.

Federal courts have long looked beyond the apparent neutrality of practices to discern and remedy interference with federally protected rights to equality of treatment. As early as 1915, in *Guinn* v. *United States,* 238 U.S. 347, this Court invalidated a provision of a state constitution which, although neutral on its face, operated to limit the rights of Negroes to vote, in violation of the Fifteenth Amendment. This Court has since consistently invalidated "so-

phisticated as well as simple-minded modes of discrimination"[9] in education and voting rights, each time finding behind the apparent racial neutrality of the challenged statute or procedure, the promotion or perpetuation of racial discrimination.

That employment rights under Title VII are legislatively created, in contrast to the constitutionally protected rights involved in the voting and school cases,[10] does not justify less judicial protection of them, as courts of appeals interpreting Title VII have uniformly recognized. For example, in *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919, the court held that Title VII prohibited a seniority system under which promotions were made on the basis of "in-job" rather than "in-plant" seniority. The effect of this system was to discriminate in favor of whites hired at the same time or later for jobs from which Negroes, who presumably would have qualified for them, were excluded when they were hired. The same court similarly ruled that restriction of union membership to relatives of current members, who were all white, was prohibited by Title VII. *Local 53 of Int. Ass'n of Heat & Frost I. & A.*

[9] *Lane* v. *Wilson*, 307 U.S. 268, 275; see, *e.g.*, *Louisiana* v. *United States*, 380 U.S. 145; *Goss* v. *Board of Education*, 373 U.S. 683; *Monroe* v. *Board of Commissioners*, 391 U.S. 450. See, also, *Smith* v. *Texas*, 311 U.S. 128, 132.

[10] But cf. *Gaston County* v. *United States*, 395 U.S. 285. The right being enforced there—the right to vote without satisfying a literacy requirement—is a legislatively created right which, although constitutionally permitted, was not in itself constitutionally mandated.

*Wkrs.* v. *Vogler*, 407 F. 2. 1047 (C.A. 5). Cf. *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552. And two counts of appeals have declared invalid union referral systems which accorded priority to union members and applicants with prior work experience where the union had permitted only whites to obtain such membership or experience.[11] District courts have generally reached similar results.[12] Indeed, in an analogous decision, a Massachusetts district court held that the Fourteenth Amendment prohibits a public employer from deciding among applicants on the basis of scores on tests which are not job-related.[13]

In each case, the courts have found that the discriminatory employment practice was not shown to be necessary to the "safe and efficient operation" of the business. *Local 189, supra*, 416 F. 2d at 989. Sincere but unsupported assertions by management of the general desirability of a given practice do not meet this test of strict necessity. Where criteria operate to exclude proportionately more Negroes than

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[11] *United States* v. *Sheet Metal Workers Int. Ass'n. Local U. 36, supra*, and *United States* v. *IBEW Local 38, supra*. See also *Marcus Jones* v. *Lee Way Motor Freight, Inc.*, No. 464-69 (C.A. 10), decided August 17, 1970.

[12] *Quarles* v. *Philip Morris, Inc., supra; Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio); *Clark* v. *American Marine Corporation*, 304 F. Supp. 603 (E.D. La.); *Robinson, et al.* v. *P. Lorillard Co.*, 62 Lab. Cas. ¶9423 (M.D. N.C.); but see *United States* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala.), appeal pending (C.A. 5, No. 27,703); *Colbert* v. *H. K. Corp.* (N.D. Ga., Civ. No. 11599, decided July 6, 1970).

[13] *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass.).

whites, the courts under Title VII have insisted that the criteria be predictive of success in performance. An example of a valid criterion suggested by the court of appeals for the Fifth Circuit was that typists pass a typing test. *Local 189, supra,* 416 F. 2d at 989. And the court of appeals for the Eighth Circuit held that union journeymen tests must "be designed to test the ability of the applicant to do that work usually required of a journeyman." *United States* v. *Sheet Metal Workers, Int. Ass'n, Local U. 36,* 416 F. 2d at 136. Accord, *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413, 452, 461 (S.D. Ohio).

The court of appeals below held, consistently with these decisions, that the high school/test requirement for transfer from the Labor Department could not be applied to Negroes who were hired prior to the time when completion of high school became a prerequisite to initial placement in other jobs because whites hired contemporaneously into those jobs had not been subjected to such a requirement. The majority refused, however, to eliminate the high school and test requirements as applied to Negroes hired after they were made applicable to all employees. It held that Duke had adopted the high school requirement with a "genuine business purpose" in mind and without any "intention to discriminate against Negro employees."

This focus on the employer's motive, rather than its need, is, we submit, what apparently misled the court. For the congressional purpose in enacting Title VII was—as its heading "Equal Employment Opportunities" suggests—to accomplish economic results, not

merely to influence motives or feelings. Discriminatory "employment practices"—not attitudes—are declared unlawful. As Judge Sobeloff's dissenting opinion in this case points out (A. 245a–246a), the congressional objective is not achieved by an interpretation of the Act which would merely assure those discriminatorily excluded from jobs for which they are, in fairness, qualified that the employer is discriminating in good faith.[14] The proper interpretation, in our view, is that articulated (in a constitutional decision) thirty years ago by Mr. Justice Black for a unanimous Court: "What the [Act] * * * prohibits is racial discrimination * * * whether accomplished ingeniously or ingenuously * * *." *Smith* v. *Texas*, 311 U.S. 128, 132.

B. THE HIGH SCHOOL COMPLETION AND WRITTEN TEST REQUIREMENTS IMPOSED HERE DISQUALIFY A SUBSTANTIALLY GREATER PROPORTION OF NEGROES THAN WHITES FROM EMPLOYMENT OPPORTUNITIES

Both a high school completion requirement and testing requirements such as those used here generally operate to disqualify a greater percentage of Negroes than whites from employment opportunities—a result which is not surprising in view of the segregated and inferior educational opportunities which have been afforded Negroes. See *Gaston County* v. *United States*, 395 U.S. 285, 295.

1. *The High School Requirement.* Reports of the Bureau of the Census confirm that proportionately

[14] Nor is the fact that the discrimination is not based *solely* on race material, in light of the Act's explicit legislative history. See Brief for the United States as *Amicus Curiae* in *Phillips* v. *Martin Marietta Corp.*, No. 73, this Term, p. 9.

fewer Negroes than whites in the United States have completed high school. In 1960, 43.2 percent of whites, but only 21.7 percent of nonwhites, in the United States who were 25 or older had completed high school.[15] Similar disparity is found in more specific comparisons, by sex, or narrower age group.[16] Thus, of nonwhite men 25 to 29 in 1960, only 36.2 percent had completed high school; the comparable figure for whites was 62.7 percent.[17] The disparity is more marked in North Carolina than in the Nation as a whole. The 1960 census figures for that State show that 37 percent of whites 25 or older had completed high school, while only 14.7 percent of nonwhites in that age group had done so.[18] Although the level of educational achievement has risen for both Negroes and whites in the past ten years, the disparity in proportion of high school graduates remains substantial.[19]

2. *The Tests.* Both the majority and dissenting opinions below were written on the premise that the respondent's testing requirements operate to disqual-

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[15] U.S. Bureau of the Census, *Census of the Population: 1960;* Volume 1, Characteristics of the Population; Part 1, Table 174, pp. 1–419, 1–420.

[16] *Ibid.*

[17] *Ibid.*

[18] U.S. Bureau of the Census, *Census of the Population: 1960;* Volume 1, Characteristics of the Population; Part 35, Table 47, p. 35–167.

[19] A recent report prepared jointly by the Bureau of Labor Statistics and the Bureau of the Census indicates that, of all Negroes 20 and 21 years old in the country in 1969, 57.8 percent had completed high school. Among all whites in the same age group, however, 81.7 percent had completed high school. Bureau of Labor Statistics *Report No. 375: The Social and Economic Status of Negroes in the United States, 1969*, p. 50.

ify Negroes in substantially higher proportions than whites "because of Negroes' cultural and educational disadvantages * * *" (A. 216a; see A. 231a–232a). As Judge Sobeloff put the matter, "No one seriously questions the fact that, in general, whites fare far better on the Company's alternative requirements than blacks" (A. 231a, n. 6). The accuracy of that premise is supported both by expert testimony in this case (see A. 140a–141a, 154a–155a) and by published studies of performance on standardized, paper-and-pencil aptitude tests, including those used here.[20]

These tests verbally measure (or sample) previously acquired knowledge and skills, as a basis for predicting ability to enhance them. Individuals or groups who have not had equal opportunity to acquire the kinds of knowledge and develop the verbal skills these tests record may obviously be expected to fare less well on them. To the extent variation in exposure is reflected by test scores, their value as an index of ability to enhance these skills is diminished. ~~Studies of the index of native ability is diminished.~~ Studies of the Wonderlic Personnel Test, employed here, and similar "standardized" tests tend to bear out this hypothesis of bias and show that the mean scores of Negroes are predictably lower than those of whites.[21]

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[20] Kirkpatrick, et al., *Testing and Fair Employment: Fairness and Validity of Personnel Tests for Different Ethnic Groups*, New York University Press, New York, 1968, at p. 5; Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1638–1649 (1969).

[21] See Cooper and Sobol, *supra*, at 1640–1641; Ruda and Albright, *Racial Differences on Selection Instruments Related to Subsequent Job Performance*, 21 Personnel Psychology 31 (1968).

### C. THERE IS NO BUSINESS NECESSITY FOR THE APPLICATION HERE OF THE DIPLOMA/TEST REQUIREMENT

The Company did not, and indeed on this record could not, show that legitimate business needs justified its application of the high school completion or test requirements to the broad categories of jobs involved.

There is no dispute that neither requirement bears a demonstrable relationship to successful performance of the jobs for which they were used. Both were adopted, as the majority below noted, without formal study of their relationship to job-performance ability (A. 93a). Rather, a vice president of the company testified, they were instituted on the company's judgment that they would generally improve the quality of the work force (A. 93a–94a). As previously indicated (*supra*, pp. 12–16), however, the test of business necessity in this context is a strict one; it is not satisfied by the mere profession of a business purpose, such as an employer's self-serving and unsupported assertion that it *thinks* the particular practice in question is desirable.

Indeed, here the same vice president acknowledged that "[t]here is nothing magic about [the high school requirement], and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up * * *" (A. 93a). And the evidence shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and progress in departments for which the high school and

test criteria now are used. Between July 2, 1965, and November 14, 1966, for example, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of employees in the entire white work force who were not high school graduates.[22] The promotion record of persons who do not meet the requirements thus indicates they are not needed even for the limited purpose of insuring that the policy of advancement within the company is not hampered by initial employment of individuals who lack the capacity to perform jobs for which they will be eligible in the future.[23]

There is, in short, no legitimate need in the safe and efficient conduct of its business which justifies the respondent's insistence on employees with credentials not shown to be job-related in jobs that were previously reserved for whites. Since these unnecessary employment requirements have a racially discriminatory effect, they are prohibited by Section 703 (a)(2) of the Act.

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[22] The Company's Answers to Plaintiffs' Interrogatories show that 15 white employees were promoted during that period, of whom 5 (33.3%) were not high school graduates. As of April 29, 1966, there were 82 white employees at Dan River, of whom 30 (36.6%) were not high school graduates (A. 77b, 83b, 109b, 126b–127b).

[23] We do not believe, in any event, that the company has made a sufficient showing of the importance of that policy to the success of its operations to justify application of its discriminatorily exclusionary requirements to the broad spectrum of jobs to which they are applied.

## II

### SECTION 703(H) OF THE ACT DOES NOT AUTHORIZE THE USE OF APTITUDE TESTS THAT ARE NOT JOB-RELATED

#### A. THE LANGUAGE OF SECTION 703(H) AND ITS INTERPRETATION BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PRECLUDE TESTS WHICH DO NOT PREDICT SUCCESS IN THE JOBS FOR WHICH THEY ARE GIVEN

The respondent contends that its tests, at least, are specifically permitted by Section 703(h) of the Act (*supra*, pp. 2–3), which authorizes use of "professionally developed ability test[s]" that are not "designed, intended, or used" to discriminate. The majority of the court below accepted this contention that Section 703(h) permits tests unrelated to prospective job performance, notwithstanding the Equal Employment Opportunity Commission's contrary interpretation, to which the Commission has consistently adhered, that Section 703(h) authorizes only the use of job-related tests.[24]

[24] The Commission's *Guidelines on Employment Testing Procedures* were adopted on August 24, 1966, and published in CCH *Employment Practice Guide* ¶16,904. Revised *Guidelines on Employee Selection Procedures*, taking the same position on employment tests, effective August 1, 1970. They are published at 29 C.F.R. part 1607, and are reprinted in the Appendix to petitioners' brief (pp. 8–11).

Three recent decisions (reported with names omitted) in which the Commission applied its job-relatedness standard to Employment tests appear in CCH *Employment Practice Guide* ¶6112 (January 29, 1970); ¶6136 (March 17, 1970); ¶6139 (February 19, 1970) (challenge to use of Wonderlic Personnel and Bennett Mechanical Aptitude tests at issue here). See, also, CCH *Employment Practice Guide* ¶17,304.53 (Dec. 2, 1966)

The Commission's interpretation is, of course, entitled to great deference from the courts and, since it is reasonable and consistent with the purpose of Title VII, should prevail. See, *e.g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *Udall* v. *Tallman*, 380 U.S. 1; *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A 7). Not only is this interpretation consistent with the statutory language, but it is the only one under which use of the word "ability" in the statutory phrase "professionally developed ability tests" is meaningful. Since any professionally developed test measures some "ability," that word, if it is not to be redundant, should be read as a delimiting term which, in context, naturally refers, as the Commission's guidelines state (*supra*, p. 3), to "ability to perform [the] particular job or class of jobs" for which the test is required.[25]

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(reprinted in appendix to petitioners' brief, pp. 1–2); ¶17,304.55 (Dec. 6, 1966) (reprinted in appendix to petitioners' brief, pp. 3–5).

[25] Moreover, Section 703(e)(1) of Title VII, 42 U.S.C. 2000e-2(e)(1), permits employment on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The Section significantly omits reference to race as a criterion for employment, implying a legislative judgment that race can never be a bona fide occupational qualification. Where, as here, the effect of employment criteria is indirectly to make race a basis of employment by screening out a disproportionate number of Negroes, the standard for justification of such criteria should surely be no less than that specified in Section 703(e)(1) for bona fide *occupational* qualifications—which must, of course, be job-related. See, generally, Brief for the United States as *Amicus Curiae* in *Phillips* v. *Martin Marietta Corp.*, No. 73, this Term.

B. THE LEGISLATIVE HISTORY OF SECTION 703(H) INDICATES THAT CONGRESS CONTEMPLATED USE OF JOB-RELATED TESTS ONLY

The present Section 703(h) was not contained in the House version of the Civil Rights Act [26] but was added on the Senate floor during extended debate. The controversy in the Senate over testing grew out of a February 1964 decision by a hearing examiner for the Illinois Fair Employment Practices Commission in the case of *Leon Myart* v. *Motorola Co.*[27] The examiner ruled that a standardized aptitude test given by Motorola to job applicants "does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and disadvantaged groups," and ordered the company to discontinue its use.[28]

The *Motorola* case was first brought to the attention of the Senate on March 12, 1964, by Senator Robertson of Virginia,[29] and was a subject of debate during the next several months. A number of opponents of the civil rights bill, including Senators Ervin,[30] Smathers,[31] Holland,[32] Hill,[33] Tower,[34] Talmadge,[35]

[26] The full text of H.R. 7152, the civil rights bill passed by the House on February 10, 1964, annotated to show the changes made by the Senate, appears at 110 Cong. Rec. 12807–12817.

[27] The decision is reprinted at 110 Cong. Rec. 5662 (1964).

[28] For an account of the *Motorola* case, and of the influence it had on congressional debate of Title VII, see Ash, *The Implications of the Civil Rights Act of 1964 for Psychological Assessment in Industry*, 21 American Psychologist 797 (1966).

[29] 110 Cong. Rec. 5081–5082.

[30] 110 Cong. Rec. 5614–5616.

[31] 110 Cong. Rec. 5999–6000.

[32] 110 Cong. Rec. 7012–7013.

[33] 110 Cong. Rec. 8447.

[34] 110 Cong. Rec. 9024.

[35] 110 Cong. Rec. 9025–9026.

Fulbright,[36] and Ellender,[37] criticized the decision. The common thread of concern in this Senate criticism was that employers would be precluded from making ability to perform a job a condition of employment.

Thus Senator Smathers charged on April 13 that Title VII would require employers to "accept applicants for jobs *irrespective of whether they have ability or not*" (emphasis added).[38]

In the same vein Senator Hill on April 20 stated that in *Motorola,* "the Illinois FEPC examiner threw merit and ability out the window as employment criterions [sic] and forced the company to hire the complainant, notwithstanding the fact that he obviously did not possess the professional standards *necessary to do the job*" (emphasis added).[39]

On April 24, Senators Tower and Talmadge engaged in a colloquy regarding the decision:

> Mr. TALMADGE. * * * Is it not true that the decision of the examiner in the Motorola case put a premium on ignorance for prospective employees, instead of intelligence?
>
> Mr. TOWER. It certainly put a premium on ignorance. It said, in effect, that a test is discriminatory if it discriminates against those who are by virtue of intellectual and educational background *incompetent to do a particular job.*
>
> * * * * *

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[36] 110 Cong. Rec. 9599–9600.

[37] *Ibid.*

[38] 110 Cong. Rec. 7791; see also, 110 Cong. Rec. 7800.

[39] 110 Cong. Rec. 8447.

It is certainly right and proper for a private company to *require that a man possess certain skills necessary to perform the work required by that company,* or that he possess a sufficient intellect to be trainable to do a specific job.

Mr. TALMADGE. The bill [Title VII] does not guarantee anyone a job at any time, does it?

Mr. TOWER. It does not guarantee anybody a job, but it would compel an employer to hire persons *whom he does not believe to be competent to perform the work* [emphasis added].[40]

Senator Fulbright, on April 29, remarked:

The Motorola case shows, too, to any reasonable person what a disastrous thing it would be if companies were prohibited from applying aptitude tests or any other kind of tests of that nature *which are intended to test the capacity or ability of an applicant for a particular job.* It is a very clear warning of what we could expect if this section of the bill were adopted [emphasis added].[41]

Proponents of Title VII sought throughout the debate to assure these critics that their fears about the implications of *Motorola* were groundless. They insisted that Title VII would have no effect on job-related tests. Senator Case, co-manager with Senator Clark of the bill on the Senate floor, issued a memorandum for the record on March 26, explaining why the *Motorola* result could not be reached under Title VII:

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[40] 110 Cong. Rec. 9025–9026.

[41] 110 Cong. Rec. 9600.

* * * * *

> [U]nlike the hearing examiner's interpretation of the Illinois law in the Motorola case, title VII most certainly would not authorize any requirement that an employer accept *an unqualified* applicant or *a less qualified* applicant and undertake to give him any additional training which might be necessary to enable him to fill the job.
>
> Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color, that is, because he is a Negro. But it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet *the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications,* rather than on the basis of race or color [emphasis added].[42]

Similarly, the Clark-Case Interpretative Memorandum of Title VII, submitted for the record on April 8, stated:

> There is no requirement in title VII that employers abandon *bona fide qualification tests* where, because of differences in background and education, members of some groups are able to perform better on those tests than members of other groups. An employer may set *his qualifications* as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance [emphasis added].[43]

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[42] 110 Cong. Rec. 6416; also reprinted at 110 Cong. Rec. 7246-7247.

[43] 110 Cong. Rec. 7213.

Despite these assurances by the bill's supporters, opposing Senators continued to fear that Title VII might be construed to prohibit the use of tests to determine qualifications for particular jobs if blacks failed such job related tests in greater proportions than whites. As a result, Senator Tower, on May 19, offered a proposed amendment to Section 703(h):

> (h) Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—
>
> (1) in the case of any individual who is seeking employment with such employer, *such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved,* and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or
>
> (2) in the case of any individual who is an employee of such employer, *such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise,* and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin."[44]

[44] 110 Cong. Rec. 11251 (emphasis added).

In urging adoption of the amendment, Senator Tower argued:

> If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person *to do a job* [emphasis added].[45]

Proponents of the bill who opposed the amendment feared that it would make discrimination more difficult to combat.[46] Senator Case's comment is particularly instructive:

> If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, *whether it was a good test or not,* so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute [emphasis added].[47]

The amendment was defeated on a roll call vote,[48] but two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of Section 703(h). He stated:

> This is similar to an amendment which I offered a day or two ago, and which was, I believe,

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[45] 110 Cong. Rec. 13492.
[46] See 110 Cong. Rec. 13503–13504.
[47] 110 Cong. Rec. 13504.
[48] 110 Cong. Rec. 13505.

agreed upon in principle. But the language was not drawn as carefully as it should have been.[49]

Senator Humphrey responded by announcing that "Senators on both sides of the aisle who were deeply interested in Title VII" [50] believed the amendment was "in accord with the intent and purpose of that title." [51] It was adopted by voice vote immediately thereafter.[52]

The debates surrounding testing and the *Motorola* case thus show that the concern among Senators was that Title VII might operate to limit employers' rights to measure job qualifications by using tests. All the early criticism focused on this fear, and Senator Tower's first proposed amendment was clearly designed to allay it. Senate supporters of the bill opposed the amendment, partly because they feared it would be misconstrued to permit broad use of tests unrelated to job performance, and it was defeated. Senator Tower then offered a substitute, after persuading the bill's sponsors that he had redrafted the amendment so as to remove this possibility, and it was adopted without substantial opposition. There is no basis for inferring from this history that the job-relatedness standard (which had been explicity included in the rejected amendment) was not to apply to the tests authorized by the substitute amendment. It shows, instead, that, as enacted, Section 703(h) was believed to be in harmony with "the very purpose of Title VII [which] is to promote

[49] 110 Cong. Rec. 13724.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*

hiring on the basis of job qualifications * * *'' (110 Cong. Rec. 6416, *supra,* p. 26) and thus to authorize only job-related tests. The court of appeals' contrary holding—that neither tests nor qualifications need be job-related even if their effect is discriminatory—sanctions unwarranted obstacles to achievement of the congressional objective of equal employment opportunities, and should be rejected by this Court.

## CONCLUSION

For the foregoing reasons we respectfully urge that the judgment of the court below on the question here presented should be reversed.

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SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970